STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2001
v	No. 214712 Wayne Circuit Court
ARTHUR SMART, Defendant-Appellant.	LC No. 98-002820

Before: Bandstra, C.J., and Griffin and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was subsequently sentenced to serve concurrent terms of twenty to forty years' imprisonment for his murder and assault convictions, to be preceded by the mandatory two-year sentence for felony-firearm. Defendant appeals as of right. We affirm.

This case arises from the early morning shooting death of Jermaine Webb on December 8, 1996. According to testimony at trial, at approximately 4:15 a.m., Webb and a passenger, Darius Vaughn, were stopped at an intersection in the city of Detroit when they were fired upon by two men who had been traveling along side Webb's vehicle in a green Jeep Cherokee. Vaughn, who was able to escape from the vehicle during the shooting and flee to the nearby home of Michael Walker, testified that he had recognized defendant, whom he had known for several years, as one of the two gunmen who had left the Jeep and fired a rifle at Webb's vehicle. Vaughn further testified, however, that although he similarly recognized Kenneth Tucker as the driver of the Jeep, and Gary Jackson as the second gunman, he did not relay this information to police on the day of the shooting because he feared for his life.[1] In fact, it was not until February 11, 1998, when police contacted Vaughn for additional questioning, that he affirmatively identified the three occupants of the Jeep on the night of the shooting.

[1] Vaughn did, however, inform police at that time that he believed the Jeep belonged to Tucker, and that "only Ken Tucker drives his truck."

Defendant, Jackson, and Tucker were thereafter each charged with first-degree murder and assault with intent to commit murder. Defendant and Jackson, who were also charged with felony-firearm, were tried before the same jury and ultimately convicted of second-degree murder, assault with intent to commit murder, and felony-firearm. Tucker, although jointly tried with defendant and Jackson, was tried before the bench and acquitted of all charges.

I

We first address defendant's argument that the trial court abused its discretion in admitting testimony concerning defendant's involvement in a second shooting alleged to have occurred only a short time after the attack upon Webb and Vaughn. Under MRE 404(b)(1), evidence of such other acts may be admitted if it is offered for a proper purpose, it is relevant to an issue or fact of consequence at trial, and its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998).

In this case, Ricardo Mitchell was permitted to testify that approximately twenty-five minutes after the shooting which took Webb's life, he and his friend James Davis were about to enter Davis' vehicle when Tucker pulled alongside them in his green Jeep Cherokee. According to Mitchell, Tucker remained behind the wheel as defendant and Jackson, both of whom he had known for a number of years, left the Jeep and fired at him with rifles.[2]

The trial court admitted Mitchell's testimony on the issue of identification and in doing so squarely cautioned the jurors that the testimony was not to be used for any other purpose. On appeal, defendant does not dispute the propriety of the purpose for which the testimony was offered, or argue that the testimony was not relevant to an issue of consequence at trial. Rather, defendant asserts that the probative value of the testimony was outweighed by its prejudicial effect, and that the trial court therefore erred in admitting the testimony at trial. We do not agree.

The issue of identification was contested by defendant, who claimed that he was home with his girlfriend at the time of the shootings. Consequently, the prosecutor was required to support Vaughn's identification of defendant as one of the two gunmen who fired upon Webb's vehicle. Given the lack of physical evidence in support of Vaughn's identification, Mitchell's testimony was highly probative on this issue. Although this evidence may have also prejudiced defendant to some extent, we do not believe that such prejudice required that the testimony be precluded. Under MRE 403, the prejudice required inures only when it appears that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). Here, given the factual and spatial similarities between the shootings, as well as the fact that both Vaughn and Mitchell positively identified defendant on the basis of previous relationships, the other acts

[2] In a bench trial related to that incident, Tucker was found not guilty of assault with intent to murder.

evidence was not just marginally probative, it was highly probative of defendant's identity as one of the two shooters involved in the attack upon Webb and Vaughn. When viewed in connection with the expressly limited purpose for which the trial court admitted the testimony, we cannot conclude that the prejudicial effect of the testimony substantially outweighed its probative value.

Accordingly, we find the similar act testimony to have been properly admissible under MRE 404(b), and that the trial court therefore did not abuse its discretion in admitting the testimony at trial.

II

Defendant next argues that the trial court erred in excluding evidence of Tucker's acquittal in the earlier trial concerning the shootings involving Mitchell and Davis. In doing so, defendant's asserts that the trial court's decision in this regard deprived him of the right to present a defense on the theory that following Tucker's acquittal, Vaughn, who was a friend of both Mitchell and Davis, had motive to ensure a conviction in the instant case by untruthfully identifying defendant and the others as those who attacked he and Webb.

The credibility of a witness is an issue that is of the utmost importance in every case and thus as part of a defendant's constitutional right to present a defense, he is guaranteed a reasonable opportunity to test the truthfulness of each witnesses' testimony. *People v Posby*, 227 Mich App 219, 226; 574 NW2d 398 (1997); *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). In this case, however, the fact that Vaughn failed to initially identify his attackers during police questioning on the morning of the shooting was seriously examined during Vaughn's cross-examination, as was both his close friendship with Mitchell and Davis, and the fact that more than one year had passed before he specifically informed the police of the identity of those involved in the shooting in which Webb was killed. Vaughn's contention that he did not inform police for such an extensive period of time because he was afraid of these three codefendants was also strongly attacked. On this record, we cannot say that defendant was denied his right to present his defense that Vaughn was untruthful. *Adamski*, *supra*. Accordingly, we find that because defendant was afforded a reasonable opportunity to attack the credibility of Vaughn's identification despite being precluded from referring to the subject verdict, no error requiring relief has been shown. MCR 2.613(A); see also *People v McIntire*, 232 Mich App 71, 102-103; 591 NW2d 231 (1998) (finding that where the inference was clearly raised, additional evidence demonstrating bias was of only marginal value), rev'd on other grounds 461 Mich 147 (1999).

III

Defendant finally argues that the trial court abused its discretion in denying his motion for a new trial on the basis that the verdict was against the great weight of the evidence. This Court reviews the trial court's denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence for an abuse of discretion. *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000). The test is whether the evidence preponderates so heavily against the verdict that it would be an miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Defendant asserts that Tucker's acquittal by the bench in both the earlier and the instant matter, when coupled with the allegedly inconsistent and contradictory testimony of various prosecution witnesses, preponderates heavily against the jury's finding of guilt. We disagree.

Initially, we note that inconsistent verdicts between codefendants furnish no reason for reversing the judgment against a defendant found guilty upon sufficient evidence. See, e.g., *People v Monasterski*, 105 Mich App 645, 659-660; 307 NW2d 394 (1981). This is especially true where, as here, the evidence adduced against one defendant was different from or weaker than that adduced against the other. As noted by the trial court in denying defendant's motion, there were marked differences in the evidence concerning the actions of each of these two defendants. Although the evidence did show that both defendants were present at the scene, Tucker, unlike defendant, was not implicated as one of the two gunmen who fired upon Webb's vehicle. Given this rather weighty distinction, we find the fact that Tucker was not similarly convicted of the charged crimes to be of no relevance to the verdict against defendant.

We further reject defendant's contention that the verdict was against the great weight of the evidence because the testimony of prosecution witnesses was inconsistent and contradictory. In making this argument defendant asserts that because both Vaughn and Mitchell failed to initially identify their assailants to police, their later statements and testimony implicating defendant were not sufficiently credible to support his conviction. However, motions for a new trial that implicate witness credibility are not favored, *People v Lemmon*, 456 Mich 625, 638-639, 642; 576 NW2d 129 (1998), and a trial judge may not grant a new trial simply on the basis of a disagreement with juror assessment of credibility. *Id*. at 627, 640. To the contrary, such motions should be granted only in exceptional cases, such as where a witness' testimony has been "seriously impeached and the case marked by uncertainties and discrepancies." *Id*. at 642-644. Here, we find that the record demonstrates no such exception.

Contrary to defendant's argument, Mitchell clearly informed police of the identities of each of the three individuals involved in the second shooting only shortly after the event. Moreover, given Vaughn's explanation that his failure to initially inform police of the identity of the shooters was motivated by fear, as well as the fact that Walker clearly indicated during his testimony that Vaughn had told him of each of the codefendants' involvement in the shooting that same morning, we do not believe that Vaughn's testimony had been so "seriously impeached" as to leave "the case marked by uncertaint[y]." *Id*.

We likewise reject defendant's assertion that both Vaughn and Mitchell's testimony indicating that there were two gunmen contradicted the physical evidence offered by the firearms expert who testified on behalf of the prosecution at trial. Although defendant is correct that this expert determined that each of the six cartridges found at the scenes were fired from the same rifle, this fact does not necessarily foreclose the possibility of a second weapon, which perhaps does not eject its spent casings, being fired at the scene. Moreover, the expert further testified that in addition to the spent cartridges, several bullet fragments which could not be connected to a specific weapon were recovered from these scenes. Given that "different minds [c]ould

naturally and fairly come to different conclusions" as to facts established by such evidence, we find that the trial court correctly declined to disturb the jury's verdict. *Id*. at 645.

We affirm.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Jeffrey G. Collins